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Sub-Commission on Prevention of
Discrimination and Protection
of Minorities
Working Group on Indigenous Populations
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Item 4 of the provisional agenda

STANDARD-SETTING ACTIVITIES: EVOLUTION OF STANDARDS CONCERNING THE RIGHTS OF INDIGENOUS POPULATIONS

Information received from United Nations organs, specialized agencies and intergovernmental organizations

CONTENTS

	Paragraphs	Page
Introduction	1 - 2	2
Information received from specialized agencies		
1. International Labour Office	1 - 16	2
2. United Nations Educational, Scientific and Cultural Organization	1 - 6	5
3. World Bank	1 - 20	6

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Introduction

1. By its resolution 1982/34 of 7 May 1982, the Economic and Social Council authorized the Sub-Commission on Prevention of Discrimination and Protection of Minorities to establish annually a working group on indigenous populations to review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations, including information requested by the Secretary-General annually, and to give special attention to the evolution of standards concerning the rights of indigenous populations.

2. The Sub-Commission, in its resolution 1991/30 of 29 August 1991, requested the Secretary-General to transmit the report of the Working Group on its ninth session (E/CN.4/Sub.2/1991/40/Rev.1) to intergovernmental organizations for specific comments and suggestions for the completion of the first reading of the text of the draft declaration on the rights of indigenous peoples (E/CN.4/Sub.2/1991/40/Rev.1, Annex II) and the beginning of the second reading at the tenth session of the Working Group. The Commission on Human Rights endorsed this request in its resolution 1992/44 of 3 March 1992. In accordance with these resolutions, appropriate communications were sent to intergovernmental organizations. The present document contains replies received as of 11 May 1992. Further replies, if any, will be included in addenda to this document.

Information received from specialized agencies

1. International Labour Office

[23 March 1992]
[Original: English]

General comments

1. The International Labour Office (ILO) reiterates its long-standing support for the Working Group on Indigenous Populations, and in particular its work to draft a declaration concerning the rights of indigenous peoples. It notes the great progress achieved in this connection at the ninth session of the Working Group in particular.

2. As a general principle, the ILO considers it vital that the declaration should in no case contain standards lower than, or in contradiction to, those contained in the Indigenous and Tribal Populations Convention, 1989 (No. 169), in the adoption of which the United Nations, inter alia, took an active role. The efforts of the two organizations, and in particular the standards adopted by them within a short period of time, should remain complementary and mutually reinforcing. It is particularly important that the ILO standards should be reinforced by the draft declaration when the ILO supervisory bodies are about to begin the examination of its implementation in 1993. 1/

3. This difference resides in the different natures of the two instruments. The declaration will not be legally binding, and it may therefore be possible to adopt provisions which express the aspirations of these peoples beyond

those which could be incorporated in a Convention. If the declaration were to contain standards either lower than or in contradiction to those in the recent ILO Convention, the result would be to diminish and compromise protection already contained in international law. These considerations should be kept in mind both at the stage of consideration in the Working Group, and at further stages when the direct participation of indigenous representatives and other NGOs in the deliberations may be more difficult. The ILO thus encourages the United Nations to compare the draft declaration and the ILO closely at every stage of its consideration.

4. As concerns the general approach of the draft, it is of course vital to safeguard and protect the traditional institutions, ways of life and values of indigenous and tribal peoples; but it is equally important to guarantee them the means to decide freely on their own development and survival as distinct peoples. The ILO suggests that the draft should include a forward-looking approach which recognizes and reconciles their present needs with their requirements for future development.

5. The title and coverage of the draft declaration should be expanded beyond "indigenous" peoples to cover other groups in similar situations; the expression used in ILO standards is "indigenous and tribal peoples". This consideration has been raised on a number of previous occasions. If it does not prove possible to adopt different terminology the draft declaration should contain language making it clear whether the term "indigenous" is to be understood as applying in the strict sense or in some wider context. The concern of the ILO here is that there are many tribal people who are not necessarily indigenous in the strict sense; or who have no greater claim to being indigenous than does the rest of the population. Governments in these countries may therefore decide that the declaration, when adopted, is not relevant to their situations if it covers only indigenous peoples.

6. The Preamble should include references to the aspirations of these peoples as well as to their rights. The 6th preambular paragraph could be reworded to emphasize that the rights of indigenous peoples should be promoted and respected, taking into account their cultures, religious beliefs and traditional values, as well as their aspirations and needs and desires for future development.

7. The Preamble should include a reference to existing international standards protecting the rights of indigenous and tribal peoples, beginning with ILO Conventions Nos. 107 and 169 which now constitute the United Nations system's only binding standards adopted specifically to cover this question. Other standards which include specific references to them, such as the recent United Nations Conventions on migrant workers and the rights of the child, should also be listed; and of course more general standards of application to them, such as the two Human Rights Covenants (going beyond the limited reference in the 13th preambular paragraph).

8. Operative paragraph 1. In line 2, the word "may" or "should" should be inserted before "freely determine". As drafted, this appears to be a statement of fact, and as such is inaccurate.

9. Operative paragraph 7. In line 1, to state that indigenous peoples have the right to "revive and practice their cultural identity and traditions", might be understood to mean that their identity and cultures are moribund. There are, to the contrary, many active and vital indigenous cultures. This might be resolved by inserting "maintain", before "revive".

10. Operative paragraph 9.

(a) In line 1, to begin the enumeration of rights with "revive" would appear to raise the same problem as that pointed out in the previous paragraph of these comments.

(b) In line 3, the word "original" is inappropriate, as it may refer to names used by peoples other than those covered by the draft declaration (i.e., inhabitants prior to those now generally considered "indigenous"). It is suggested that "the original" be replaced by "their own".

(c) In line 4 (this relates also to a number of other provisions), the word "shall" is inappropriate to a declaration, and consideration might be given to replacing it by "should".

11. Operative paragraph 10. This provision would appear to provide a lesser degree of protection than the provisions of Convention No. 169 in this connection. It should at a minimum provide also for access to education on a footing at least equal to that of other sections of the national population, and the right to education to at least the same level as others in the country. See articles 26 to 31 of Convention No. 169. (See below for questions covered in Convention No. 169 which are omitted here.)

12. Land rights - operative paragraphs 14 to 17. Two important questions covered in Convention No. 169 appear to have been omitted from this section. There is no reflection of the concern in the ILO Convention of the need to ensure that these peoples are provided with lands suitable to meet both their present demands and their future needs, an important aspect of their right to development. There is also no provision to protect them in situations in which relocation may occur, a particularly serious omission in this draft declaration. In the latter regard, there would be no contradiction between positing the general proposition that they should not be subject to relocation, and providing for their rights in case they are. There may be situations of force majeure, for example.

13. Operative paragraph 17. In line 3, it would not appear correct to posit a right to international cooperation. It might be appropriate, however, to insert the words "the right to receive" before "international". It should be recalled here that technical assistance from intergovernmental organizations - and certainly this is true of the ILO - is often directed to and administered by indigenous communities and other NGOs. It takes place, however, in the context of assistance carried out in agreement with the State concerned.

14. Draft operative paragraph 20. Some kind of relationship should be establishing between the effect on these peoples to development programmes, and the influence they should be able to exert over them.

15. Draft operative paragraph 24. In line 1, the words "establish, maintain and" should be added before "decide".

16. Other points. In addition to the points mentioned above in paragraph 12 of these comments, it should be noted that no provisions are included on health care and access to health services, recruitment and conditions of employment, vocational training, and access to social services, all covered in Convention No. 169.

2. United Nations Educational, Scientific and Cultural Organization

[24 April 1992]
[Original: English]

1. The United Nations Educational, Scientific and Cultural Organization (UNESCO) would like to reiterate the comments and suggestions previously made and contained in document E/CN.4/Sub.2/1991/36.

2. As a general remark, UNESCO would propose for the purpose of the draft declaration the elaboration of a definition of the term "indigenous peoples". The relevant conventions of the International Labour Organisation, namely No. 107, No. 109 and No. 169, could provide useful references in such an endeavour.

3. An accepted definition would greatly facilitate further work on the draft declaration and would avoid the ambiguity which now exists in a number of paragraphs dealing with the rights of indigenous peoples and the rights of persons belonging to them (4th preambular paragraph, operative paragraphs 2, 3, etc.).

4. Operative paragraphs 10 and 11 deal with education and adequately cover the educational rights of indigenous peoples.

5. However, the preambular paragraphs, while recognizing and emphasizing the general and specific rights of indigenous peoples, do not at all mention the importance of those rights in relation to education. We therefore suggest that the 10th, 11th and 13th preambular paragraphs be amended as follows:

(a) The 10th preambular paragraph should include reference to the right to education for all; it should read:

"Emphasizing ... to the rights and needs of indigenous women, youth and children, and in particular, to their rights to equality of educational opportunities and access to all levels and forms of education,";

(b) The 11th preambular paragraph should read:

"Recognizing ... shared responsibility for the education and upbringing of the children,";

(c) The 13th preambular paragraph should include the word "educational" as follows:

"Noting ... to pursue their material, cultural, educational and spiritual development in conditions of freedom and dignity,".

6. In the view of UNESCO, in future work on the elaboration of the draft declaration, due attention should be given to, and account taken - mutatis mutandis - of existing international instruments.

3. World Bank*

[2 March 1992]
[Original: English]

Introduction

1. This directive describes Bank 2/ policies and processing procedures for projects that affect indigenous peoples. It sets out basic definitions, policy objectives, guidelines for the design and implementation of project provisions or components for indigenous peoples, and processing and documentation requirements.

2. The directive provides policy guidance to (a) ensure that indigenous people benefit from development projects, and (b) avoid or mitigate potentially adverse effects on indigenous people caused by Bank-assisted activities. Special action is required where Bank investments affect indigenous peoples, tribes, ethnic minorities, or other groups whose social and economic status restricts their capacity to assert their interests and rights in land and other productive resources.

Definitions

3. The terms "indigenous peoples", "indigenous ethnic minorities", "tribal groups" and "scheduled tribes" describe social groups with a social and cultural identity distinct from the dominant society that makes them uvulnerable to being disadvantaged in the development process. For the purposes of this directive, "indigenous peoples" is the term that will be used to refer to these groups.

4. Within their national constitutions, statutes, and relevant legislation, many of the Bank's borrower countries include specific definitional clauses and legal frameworks that provide a preliminary basis for identifying indigenous peoples.

5. Because of the varied and changing contexts in which indigenous peoples are found, no single definiton can capture their diversity. Indigenous people are commonly among the poorest segments of a population. They engage in economic activities that range from shifting agriculture in or near forests to

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* The following is reprinted from The World Bank Operational Manual, Operational Directive OD 4.20, Indigenous Peoples, September 1991.

wage labour or even small-scale market-oriented activities. Indigenous peoples can be identified in particular geographical areas by the presence in varying degrees of the following characteristics:

(a) a close attachment to ancestral territories and to the natural resources in these areas;

(b) self-identification and identification by others as members of a distinct cultural group;

(c) an indigenous language, often different from the national language;

(d) presence of customary social and political institutions; and

(e) primarily subsistence-oriented production.

Task managers (TMs) must exercise judgement in determining the populations to which this directive applies and should make use of specialized anthropological and sociological experts throughout the project cycle.

Objective and policy

6. The Bank's broad objective towards indigenous people, as for all the people in its member countries, is to ensure that the development process fosters full respect for their dignity, human rights and cultural uniqueness. More specifically, the objective at the centre of this directive is to ensure that indigenous peoples do not suffer adverse effects during the development process, particularly from Bank-financed projects, and that they receive culturally compatible social and economic benefits.

7. How to approach indigenous peoples affected by development projects is a controversial issue. Debate is often phrased as a choice between two opposed positions. One pole is to insulate indigenous populations whose cultural and economic practices make it difficult for them to deal with powerful outside groups. The advantages of this approach are the special protections that are provided and the preservation of cultural distinctiveness; the costs are the benefits foregone from development programmes. The other pole argues that indigenous people must be acculturated to dominant society values and economic activities so that they can participate in national development. Here the benefits can include improved social and economic opportunities, but the cost is often the gradual loss of cultural differences.

8. The Bank's policy is that the strategy for addressing the issues pertaining to indigenous peoples must be based on the informed particpation of the indigenous people themselves. Thus, identifying local preferences through direct consultation, incorporation of indigenous knowledge into project approaches, and appropriate early use of experienced specialists are core activities for any project that affects indigenous peoples and their rights to natural and economic resources.

9. Cases will occur, especially when dealing with the most isolated groups, where adverse impacts are unavoidable and adequate mitigation plans have not been developed. In such situations, the Bank will not appraise projects until suitable plans are developed by the borrower and reviewed by the Bank. In other cases, indigenous people may wish to be and can be incorporated into the development process. In sum, a full range of positive actions by the borrower must ensure that indigenous people benefit from development investments.

Bank role

10. The Bank addresses issues on indigenous peoples through (a) country economic and sector work, (b) technical assistance, and (c) investment project components or provisions. Issues concerning indigenous peoples can arise in a variety of sectors that concern the Bank; those involving, for example, agriculture, road construction, forestry, hydropower, mining, tourism, education and the environment should be carefully screened. 3/ Issues related to indigenous peoples are commonly identified through the environmental assessment or social impact assessment processes and appropriate measures should be taken under environmental mitigation actions (see OD 4.01, Environmental Assessment, to be issued).

11. Country Economic and Sector Work. Country departments should maintain information on trends in government policies and institutions that deal with indigenous peoples. Issues concerning indigenous peoples should be adddressed explicitly in sector and subsector work and brought into the Bank-country dialogue. National development policy frameworks and institutions for indigenous peoples often need to be strengthened in order to create a stronger basis for designing and processing projects with components dealing with indigenous peoples.

12. Technical Assistance. Technical assistance to develop the borrower's abilities to address issues on indigenous peoples can be provided by the Bank. Technical assistance is normally given within the context of project preparation, but technical assistance may also be needed to strengthen the relevant government institutions or to support development initiatives taken by indigenous people themselves.

13. Investment Projects. For an investment project that affects indigenous peoples, the borrower should prepare an indigenous peoples development plan that is consistent with the Bank's policy. Any project that affects indigenous peoples is expected to include components or provisions that incorporate such a plan. When the bulk of the direct project beneficiaries are indigenous people, the Bank's concerns would be addressed by the project itself and the provisions of this OD would thus apply to the project in its entirety.

Indigenous peoples development plan 4/

Prerequisites

14. Prerequisites of a successful development plan for indigenous peoples are as follows:

(a) The key step in project design is the preparation of a culturally appropriate development plan based on full consideration of the options preferred by the indigenous people affected by the project.

(b) Studies should make all efforts to anticipate adverse trends likely to be induced by the project and develop the means to avoid or mitigate harm. 5/

(c) The institutions responsible for government interaction with indigenous peoples should possess the social, technical and legal skills needed for carrying out the proposed development activities. Implementation arrangements should be kept simple. They should normally involve appropriate existing institutions, local organizations and nongovernmental organizations (NGOs) with expertise in matters relating to indigenous peoples.

(d) Local patterns of social organization, religious beliefs and resource use should be taken into account in the plan's design.

(e) Development activities should support production systems that are well adapted to the needs and environment of indigenous peoples and should help production systems under stress to attain sustainable levels.

(f) The plan should avoid creating or aggravating the dependency of indigenous people on project entities. Planning should encourage early handover of project management to local people. As needed, the plan should include general education and training in management skills for indigenous people from the onset of the project.

(g) Successful planning for indigenous peoples frequently requires long lead times, as well as arrangements for extended follow-up. Remote or neglected areas where little previous experience is available often require additional research and pilot programmes to fine-tine development proposals.

(h) Where effective programmes are already functioning, Bank support can take the form of incremental funding to strengthen them rather than the development of entirely new programmes.

Contents

15. The development plan should be prepared in tandem with the preparation of the main investment. In many cases, proper protection of the rights of indigenous people will require the implementation of special project components that may lie outside the primary project's objectives. These components can include activities related to health and nutrition, productive infrastructure, linguistic and cultural preservation, entitlement to natural resources, and education. The project component for indigenous peoples development should include the following elements, as needed:

(a) Legal framework. The plan should contain an assessment of (i) the legal status of the groups covered by this OD, as reflected in the country's constitution, legislation, and subsidiary legislation (regulations, administrative orders, etc.); and (ii) the ability of such groups to obtain

access to and effectively use the legal system to defend their rights. Particular attention should be given to the rights of indigenous peoples to use and develop the lands that they occupy, to be protected against illegal intruders, and to have access to natural resources (such as forests, wildlife, and water) vital to their subsistence and reproduction.

(b) Baseline data. Baseline data should include (i) accurate, up-to-date maps and aerial photographs of the area of project influence and the areas inhabited by indigenous peoples; (ii) analysis of the social structure and income sources of the population; (iii) inventories of the resources that indigenous people use and technical data on their production systems; and (iv) the relationship of indigenous peoples to other local and national groups. It is particularly important that baseline studies capture the full range of production and marketing activities in which indigenous people are engaged. Site visits by qualified social and technical experts should verify and update secondary sources.

(c) Land tenure. When local legislation needs strengthening, the Bank should offer to advise and assist the borrower in establishing legal recognition of the customary or traditional land tenure systems of indigenous peoples. Where the traditional lands of indigenous peoples have been brought by law into the domain of the State and where it is inappropriate to convert traditional rights into those of legal ownership, alternative arrangements should be implemented to grant long-term, renewable rights of custodianship and use to indigenous peoples. These steps should be taken before the initiation of other planning steps that may be contingent on recognized land titles.

(d) Strategy for local participation. Mechanisms should be devised and maintained for participation by indigenous people in decision-making throughout project planning, implementation, and evaluation. Many of the larger groups of indigenous people have their own representative organizations that provide effective channels for communicating local preferences. Traditional leaders occupy pivotal positions for mobilizing people and should be brought into the planning process, with due concern for ensuring genuine representation of the indigenous population. 6/ No foolproof methods exist, however, to guarantee full local-level participation. Sociological and technical advice provided through the Regional environment divisions (REDs) is often needed to develop mechanisms appropriate for the project area.

(e) Technical identification of development or mitigation activities. Technical proposals should proceed from on-site research by qualified professionals acceptable to the Bank. Detailed descriptions should be prepared and appraised for such proposed services as education, training, health, credit, and legal assistance. Technical descriptions should be included for the planned investments in productive infrastructure. Plans that draw upon indigenous knowledge are often more successful than those introducing entirely new principles and institutions. For example, the potential contribution of traditional health providers should be considered in planning delivery systems for health care.

(f) Institutional capacity. The government institutions assigned responsibility for indigenous peoples are often weak. Assessing the track record, capabilities, and needs of those institutions is a fundamental requirement. Organizational issues that need to be addressed through Bank assistance are the (i) availability of funds for investments and field operations; (ii) adequacy of experienced professional staff; (iii) ability of indigenous peoples' own organizations, local administration authorities, and local NGOs to interact with specialized government institutions; (iv) ability of the executing agency to mobilize other agencies involved in the plan's implementation; and (v) adequacy of field presence.

(g) Implementation schedule. Components should include an implementation schedule with benchmarks by which progress can be measured at appropriate intervals. Pilot programmes are often needed to provide planning information for phasing the project component for indigenous peoples with the main investment. The plan should pursue the long-term sustainability of project activities subsequent to completion of disbursement.

(h) Monitoring and evaluation. 7/ Independent monitoring capacities are usually needed when the institutions responsible for indigenous populations have weak management histories. Monitoring by representatives of indigenous peoples' own organizations can be an efficient way for the project management to absorb the perspectives of indigenous beneficiaries and is encouraged by the Bank. Monitoring units should be staffed by experienced social science professionals, and reporting formats and schedules appropriate to the project's needs should be established. Monitoring and evaluation reports should be reviewed jointly by the senior management of the implementing agency and by the Bank. The evaluation reports should be made available to the public.

(i) Cost estimates and financing plan. The plan should include detailed cost estimates for planned activities and investments. The estimates should be broken down into unit costs by project year and linked to a financing plan. Such programmes as revolving credit funds that provide indigenous people with investment pools should indicate their accounting procedures and mechanisms for financial transfer and replenishment. It is usually helpful to have as high a share as possible of direct financial participation by the Bank in project components dealing with indigenous peoples.

Project processing and documentation

Identification

16. During project identification, the borrower should be informed of the Bank's policy for indigenous peoples. The approximate number of potentially affected people and their location should be determined and shown on maps of the project area. The legal status of any affected groups should also be discussed. TMs should ascertain the relevant government agencies, and their policies, procedures, programmes, and plans for indigenous peoples affected by the proposed project (see paras. 11 and 15 (a)). TMs should also initiate anthropological studies necessary to identify local needs and preferences

(see para. 15 (b)). TMs, in consultation with the REDs, should signal indigenous peoples issues and the overall project strategy in the Initial Executive Project Summary (IEPS).

Preparation

17. If it is agreed in the IEPS meeting that special action is needed, the indigenous peoples development plan or project component should be developed during project preparation. As necessary, the Bank should assist the borrower in preparing terms of reference and should provide specialized technical assistance (see para. 12). Early involvement of anthropologists and local NGOs with expertise in matters related to indigenous peoples is a useful way to identify mechanisms for effective participation and local development opportunities. In a project that involves the land rights of indigenous peoples, the Bank should work with the borrower to clarify the steps needed for putting land tenure on a regular footing as early as possible, since land disputes frequently lead to delays in executing measures that are contingent on proper land titles (see para. 15 (c)).

Appraisal

18. The plan for the development component for indigenous peoples should be submitted to the Bank along with the project's overall feasibility report, prior to project appraisal. Appraisal should assess the adequacy of the plan, the suitability of policies and legal frameworks, the capabilities of the agencies charged with implementing the plan, and the adequacy of the allocated technical, financial, and social resources. Appraisal teams should be satisfied that indigenous people have participated meaningfully in the development of the plan as described in paragraph 14 (a) (also see para. 15 (d)). It is particularly important to appraise proposals for regularizing land access and use.

Implementation and supervision

19. Supervision planning should make provisions for including the appropriate anthropological, legal, and technical skills in Bank supervision missions during project implementation (see para. 15 (g) and (h), and OD 13.05, Project supervision). Site visits by TMs and specialists are essential. Mid-term and final evaluations should assess progress and recommend corrective actions when necessary.

Documentation

20. The borrower's commitments for implementing the indigenous peoples development plan should be reflected in the loan documents; legal provisions should provide Bank staff with clear benchmarks that can be monitored during supervision. The Staff Appraisal Report and the Memorandum and Recommendation of the President should summarize the plan or project provisions.

Notes

1/ First reports will be due from the first two ratifying States on 15 October 1992, and will be considered by the Committee of Experts on the Application of Conventions and Recommendations at its March 1993 session. Reports from other ratifying States will be examined progressively in later years.

2/ "Bank" includes IDA, and "loans" include credits.

3/ Displacement of indigenous people can be particularly damaging and special efforts should be made to avoid it. See OD 4.30, Involuntary Resettlement, for additional policy guidance on resettlement issues involving indigenous people.

4/ Regionally specific technical guidelines for preparing indigenous peoples components and case studies of best practices, are available from the Regional Environment Divisions (REDs).

5/ For guidance on indigenous peoples and environmental assessment procedures, see OD 4.01, Environmental Assessment, and Chapter 7 of World Bank, Environmental Assessment Sourcebook, Technical Paper No. 139 (Washington, D.C., 1991).

6/ See also "Community Involvement and the Role of Non-Governmental Organizations in Environmental Assessment" in World Bank, Environmental Sourcebook, Technical Paper No. 139 (Washington, D.C., 1991).

7/ See OD 10.70, Project Monitoring and Evaluation.